IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. [redacted] 21

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), An Unincorporated Labor Organization, and MICHAEL VOLK, An Individual,
Petitioners,
vs.
PAUL S. RUSSELL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, (UAW-CIO), and Michael Volk pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama, entered in the above entitled case on March 22, 1956, as to which a Motion for Rehearing was denied by that Court by entry dated June 21, 1956.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Alabama was entered on March 22, 1956, and is reported at 88 So. 2d 175, in the unofficial reports. The opinion, printed in Appendix B hereto, p. 8a, *infra*,* and appearing at R. 693, has not yet been reported in the official reports. An earlier opinion of the Supreme Court of Alabama in the instant case in an appeal taken by the Respondent, is reported in 258 Ala. 615, 64 So. 2d 384. The earlier opinion is printed in Appendix C hereto, p. 30a, *infra*, and appears at R. 722.

JURISDICTION

The Respondent, Paul S. Russell, filed his complaint for damages in two counts against the Petitioners and other individuals and organizations in the Circuit Court of Morgan County, Alabama, on July 14, 1952 (R. 2-4). The Complaint, as finally amended, leaves only the Petitioners as defendants, all other defendants having been stricken by amendment, and claims, in two counts, damages because of alleged wrongful interference with the Respondent's right to work during a strike (R. 43; Appendix D, p. 46a; R. 51; Appendix D, p. 49a; R. 53-54, Appendix D, p. 58a).

Petitioners asserted in a plea to the jurisdiction before the trial court in their Motion for New Trial, and before the Supreme Court of Alabama that the state court was without jurisdiction to entertain the complaint or to grant the relief prayed for as the exercise of such jurisdiction would be unconstitutional and in derogation of the authority exercised by Congress in the enactment of the Na-

*Appendices follow in separate booklet.

tional Labor Relations Act, as amended and was an interference with the federally protected right under Section 7 of the National Labor Relations Act, as amended, to engage in concerted activities.

The judgment of the Supreme Court of Alabama was entered on March 22, 1956 (R. 708; Appendix B, p. 28a, *infra*). A timely application for rehearing was denied on June 21, 1956 (R. 716, Appendix B, p. 29a, *infra*). The jurisdiction of this court is invoked under 28 U. S. C. para. 1257(3). [Since rights, privileges and immunities are specially set up and claimed under the Constitution and statutes of the United States and are believed to have been improperly denied by the highest court of the State of Alabama.]

The presentation of the Federal questions is discussed in more detail under Statement of the Case, pp. 6-18, *infra*.

QUESTIONS PRESENTED

I.

Whether the State of Alabama through the device of a common law tort action filed by an *employee*, has assumed control of and imposed its regulations upon, the right to strike and the right to refrain from striking guaranteed by Section 7 of the National Labor Relations Act, as amended, in derogation of the holding of this Court in *Amalgamated Association of Street, etc., Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383, 390, note 12, and in other decisions, that the National Labor Relations Board was given exclusive jurisdiction to enforce the rights of *employees* and that the Federal Act had occupied this field to the exclusion of state regulation.

II.

Whether the court of the State of Alabama has jurisdiction to grant redress in damages to an *employee* of an industry affecting interstate commerce for alleged interference with his right to work during a strike when such right is guaranteed and protected by Section 7 of the National Labor Relations Act, as amended, and when Congress in Sections 8 (b) (1) and 10 of that Act "prescribed procedure for dealing with the consequences of (such) tortious conduct already committed."[1]

[Whether the authority granted by Congress to the National Labor Relations Board in Section 10 (c) of the Act to make reparation orders empowers the Board to order a union to make an employee whole for wages allegedly lost because of his having been prevented from working during a strike in violation of Section 8 (b) (1), and if so, is this power in the Board to give redress for past unfair labor practices exclusive.]

III.

Does a charge to the jury that Respondent was entitled to a verdict if the jury found that Respondent was prevented from entering his place of employment for a long period of time during a strike, without further requiring the jury to find that work was available for Respondent at his place of employment during the strike, infringe upon the federally guaranteed right to engage in a lawful strike without pecuniary liability.

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[1] *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 665.

IV.

Did the Supreme Court of Alabama deny the federally protected right to strike by its decision that the verdict for Respondent was authorized when there was no evidence in the record sufficient to show that work would have been available to Respondent if he had entered his place of employment, and when the evidence demanded the conclusion that the employer closed the place of employment to work because of a lawful strike engaged in by a great majority of employees and not because of alleged improper picketing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Article I, Section 8, Clauses 3 and 18 (Commerce Powers)

Article VI, Clause 2 (Federal Supremacy)

Labor Management Relations Act, 1947 (June 23, 1947, Ch. 120, Sec. 1, *et seq.* 61 Stat. 134, *et seq;* 29 U. S. C. 141, *et seq.*):

National Labor Relations Act, as amended by *Labor Management Relations Act,* 1947 (June 23, 1947, Ch. 120, Title I, Sec. 101; 61 Stat. 136, *et seq.;* 29 U. S. C. 151, *et seq.):*

61 Stat. 136, 29 U. S. C. 141 (b) [LMRA, Sec. 1 (b)]

61 Stat. 140, 29 U. S. C. 157 [NLRA, Sec. 7]

61 Stat. 140, 29 U. S. C. 158 (b) (1) and (2) [NLRA, Sec. 8 (b) (1) and (2)]

61 Stat. 146, 29 U. S. C. 160 (a) and (c) [NLRA, Sec. 10 (a) and (c)]

61 Stat. 151, 29 U. S. C. 163 [NLRA, Sec. 13]

61 Stat. 156, 29 U. S. C. 185 (a) [LMRA, Sec. 301 (a)]

61 Stat. 158, 29 U. S. C. 187 (b) [LMRA, Sec. 303 (b)]

Texts are set out in Appendix A, pp. 3a-7a, *infra*.

STATEMENT OF THE CASE

and Presentation of the Federal Questions

By order of the National Labor Relations Board, dated November 21, 1949 (R. 184-6), and by order of the Director of the Tenth Region of the National Labor Relations Board, dated May 4, 1951 (R. 186-7), the Union Petitioner was certified as the exclusive representative of employees of the Calumet and Hecla Consolidated Copper Company (Wolverine Tube Division) in Decatur, Alabama for purposes of collective bargaining. All production and maintenance employees of the Decatur plant comprised the bargaining units thus certified (R. 188).

On July 14, 1952, the Respondent, Paul S. Russell (R. 2) and twenty-nine other employees of Calumet and Hecla (R. 134-139) filed identical damage suits against Petitioners and other organizations and individuals, each complaint claiming $50,000 damages for alleged interference with the right of such persons to work during a strike at the Decatur, Alabama plant of Calumet and Hecla. On August 15, 1952, the defendants in the Russell action filed their Plea to the Jurisdiction based upon federal pregmption (R. 9). By amended complaint, filed December 15, 1952, the Respondent struck all defendants from his complaint except Petitioners and four individual members of the Petitioning Union (R. 43). The defendants, including Petitioners, refiled their Plea to the Jurisdiction to the complaint as

amended and the Respondent filed a demurrer to the plea (R. 45). Upon hearing the trial court overruled the demurrer, the effect of which ruling was to sustain the plea of federal preemption. The Respondent took a judgment of non-suit and appealed the ruling of the trial court to the Supreme Court of Alabama. By decision dated March 13, 1953 (*Russell v. International Union, United Automobile Aircraft and Agricultural Implement Workers of America, CIO*, 258 Ala. 615, 64 S. 2d 384) the Supreme Court of Alabama reversed the decision of the trial court, holding that the National Labor Relations Board was without jurisdiction to redress an interference with the right to work during a strike by an order for the payment of money, and that the State of Alabama retained jurisdiction to entertain the Respondent's action for damages. (R. 722-32, Appendix C, pp. 30a-45a, *infra.*)

First Federal Question

The Respondent's complaint was reinstated in the trial court and Petitioners again filed their Plea to the Jurisdiction. In accordance with the directions of the Supreme Court of Alabama the trial court then sustained the Respondent's demurrer to the plea (R. 53, Appendix D, p. 58a). On the final day of the trial Respondent amended his complaint to strike all individual member defendants leaving only the Petitioning Union and its representative and agent, Michael Volk, as defendants in the action. The Petitioners refiled the Plea to the Jurisdiction and the Respondent refiled his demurrer to the Plea. The demurer was again sustained (R. 54, Appendix D, p. 60a).

The Respondent's complaint for damages, as amended (R. 43, 51, Appendix D, pp. 46a, 49a) was in two counts. The first count claimed damages in the sum of $50,000, in that

the Union Petitioner was the bargaining agent for certain employees of the Respondent's employer and called a strike to begin on July 18, 1951, and in that the defendants, in order to make the strike effective, established a picket line and prevented the Respondent from entering his place of employment by means of mass picketing and threats of violence, thereby causing him to lose time from his work from July 18, 1951 to August 22, 1951.

Count Two added the allegation that the defendants had conspired together with other persons not made parties to the suit, to prevent plaintiff from entering his place of employment, and that in furtherance of the conspiracy had blocked the street by mass picketing and threats of violence, and had caused Respondent to lose time from his employment for one month.

Both counts claimed compensatory and punitive damages.

The Petitioners' Plea to the Jurisdiction (R. 9; Appendix D, p. 50a) alleged that the Calumet and Hecla Consolidated Copper Company, named as Respondent's employer, was at all times referred to in the complaint an industry which affected interstate commerce within the meaning of the National Labor Relations Act, as amended; that the Petitioning Union, at all times referred to in the complaint, was a labor organization within the meaning of that Act and was the collective bargaining agent for certain employees of the employer; that during the entire period of time referred to in the complaint, the employees represented by the Union were engaged in a strike and maintained a picket line at the entrance to the employer's premises for the purpose of their mutual aid and protection, as was their right and privilege under the provisions of Section 7 of the National Labor Relations Act; that the

activity of said employees represented by the Union and their supporters was the entire foundation of Respondent's complaint for damages; that the Congress of the United States in the exercise of its power over interstate commerce, has provided for the complete administration and enforcement of the rights and duties created and defined by the National Labor Relations Act, and has created an exclusive forum, the National Labor Relations Board, for the administration and enforcement of said rights and duties; that the subject matter of the complaint, if true, was regulated by Section 8 (b) (1) of the National Labor Relations Act, the jurisdiction for the regulation and enforcement of which is granted exclusively to the National Labor Relations Board, together with authority to take such remedial action and grant such relief as the Board shall deem appropriate for the violation of said section, to the exclusion of the exercise of any jurisdiction over the subject matter of the complaint by the state court; that the state court was without jurisdiction over the subject matter of the complaint, or to grant the relief prayed for in the complaint; and that for the court to entertain the complaint and grant the relief prayed for would be in violation of Article II, Section 8, Paragraph 3 of the Constitution of the United States, for the reason that said constitutional provision grants Congress exclusive jurisdiction to regulate commerce between the several states, and, Congress having undertaken to regulate such commerce by the National Labor Relations Act; as amended, any action by the court upon the subject matter therein regulated would be in derogation of the authority granted to and exercised by Congress under said Constitutional provision. The Plea was addressed to each count of the

complaint severally, and prayed that the complaint and each of its counts be dismissed.

The Respondent's demurrer to the Plea (R. 45, Appendix D. p. 55a), asserts that the National Labor Relations Board does not have jurisdiction to award the Respondent relief on account of the acts alleged in the complaint, or to redress the wrongful conduct allegedly committed by Petitioners; that the exercise of jurisdiction by the court could not in any manner impair, qualify or subtract from any of the rights guaranteed and protected by the National Labor Relations Act, as amended; that the state has authority to entertain the common law tort action alleged in the complaint and award damages to the Respondent in the exercise of its police power; and that this remedy before the state court is in addition to the remedy before the National Labor Relations Board and is not inconsistent with the exercise of jurisdiction by the National Labor Relations Board.

After verdict and judgment in the amount of $10,000 had been entered against the Petitioners, following jury trial (R. 54, Appendix D, p. 60a), and after Motion for New Trial had been overruled (R. 79) the judgment of the trial court sustaining the demurrer to Petitioners' Plea to the Jurisdiction was assigned as error in an appeal to the Supreme Court of Alabama. Assignments of Error Numbers 1, 2 and 4 (R. 653-4, Appendix D, p. 61a) raised the question of Federal preemption before the Supreme Court of Alabama. The Supreme Court of Alabama again entertained the question thus raised, and, after considering the same, again reached the determination that the jurisdiction of the National Labor Relations Board was not exclusive and that the trial court had jurisdiction to entertain the complaint and grant the relief prayed (R. 693-5,

Appendix B, pp. 8a-11a). In reaching its decision the Supreme Court of Alabama relied upon the decision of the Supreme Court of Virginia in *United Construction Workers v. Laburnum Construction Corporation*, 194 Va. 872, 75 S. E. 2d 694, (which had relied upon the previous decision of the Supreme Court of Alabama in this case in reaching its decision), and upon the decision of this Court in the same case (347 U. S. 656). The Supreme Court of Alabama entered its decision on March 22, 1956 (R. 708, Appendix B, p. 28a), and timely application for rehearing was denied on June 21, 1956 (R. 716, Appendix B, p. 29a, *infra*)[2]

Second Federal Question

The Respondent filed with the trial court a written requested charge (Number 9), which was granted by the trial court and given in charge to the jury. Said Charge No. 9 is as follows:

> "9. The Court charges the jury that picketing is lawful when it is for the purpose of observation, or for the purpose of peaceful persuasion, or for the purpose of apprising others of a dispute between employer and employees, but that picketing is unlawful if carried on with intimidation, threats, coercion, force or violence. Picketing is unlawful if such a large number of pickets is utilized as to obstruct a public street and block the entrance to a plant from said street, or if the pickets use threats or abusive language towards others to such an extent as to instill fear of harm or injury in the mind of a reasonable man. The Court further charges the jury that if the defendants in this case stationed or

[2] The following cases are believed to sustain the presentation of the Federal question. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933; *Garner v. Teamsters Union*, 346 U. S. 485; *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656.

> caused pickets to be stationed on a public street, as alleged in the complaint, for the purpose of preventing plaintiff and others from entering into their place of employment by means of intimidation, threats, coercion, force or violence, and if you are reasonably satisfied from the evidence that the number of pickets and their conduct as alleged in the complaint was such as to prevent the plaintiff by such unlawful means from entering his place of employment, and as a proximate consequence thereof the plaintiff was denied access to his place of employment for a long period of time, you should return a verdict in favor of the plaintiff." (R. 634, Appendix D, p. 63a.)

The giving of this charge was set forth as cause for a new trial (R. 59), and the motion for new trial was denied (R. 79). Error was assigned upon the giving of this charge to the jury in Assignment of Error Number 41, in the Supreme Court of Alabama (R. 662, Appendix D, p. 63a) upon the contention that the charge permitted the jury to return a verdict of damages for the Respondent without requiring the jury to first find that work would have been available for the Respondent during the period of time when Petitioners were conducting a lawful strike at the premises of Respondent's employer pursuant to their Federally protected right under Section 7 of the National Labor Relations Act as amended, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection free of liability in damages to employer or employees because of a loss of work as a proximate consequence of such strike. The Supreme Court of Alabama entertained this Assignment of Error and ruled against the Petitioners' contention saying:

> "Appellants argue that Charge No. 9, given at the request of plaintiff, authorizes the jury to find

for plaintiff upon the basis that unlawful picketing alone is sufficient to create a cause of action. We are not convinced that the charge necessarily must be so construed. Where a charge is susceptible of two constructions, appellate courts will indulge the construction which will sustain rather than condemn." (R. 705, Appendix B, p. 24a.)

The Supreme Court of Alabama did not explain the alternative construction which supposedly would sustain the propriety of the charge. It is contended that in this construction of the charge the Supreme Court of Alabama infringed upon the Federally protected right to strike.[3]

Third Federal Question

Among the grounds of the Motion for New Trial, filed after adverse verdict and judgment in the trial court, were contentions that the verdict of the jury was not sustained by the evidence, and was contrary to the great weight of the evidence (R. 55). After the Motion for New Trial was overruled (R. 79), error was assigned upon these grounds of the Motion for New Trial in Assignments of Error Numbers 77 and 78, in the Supreme Court of Alabama (R. 677, Appendix D, p. 64a).

The Supreme Court of Alabama denied the Petitioners' contention that the evidence in the case affirmatively showed that any loss of wages accruing to the Respondent was proximately caused by the strike in which a large majority of employees engaged so that the employer did not attempt to operate its plant during the strike and the Petitioners' contention that there was no evidence in the record to show that the Respondent would have earned

[3] The case of *St. Louis, I. M. & B. R. Co. v. Starbird*, 243 U. S. 592, is believed to sustain the presentation of the Federal question.

wages during the strike except for the conduct of the picket line. In passing upon these Assignments of Error the Alabama Supreme Court said:

> "Appellants' argument is based on the theory that the plaintiff is not entitled to any recovery against the defendant if plaintiff's loss of working time and wages was due to a closing of the plant by his employer and not due to any action on the part of the defendants which may have prevented plaintiff from crossing the picket line. Appellants argue that the evidence clearly shows that plaintiff's employer closed the plant to all hourly-rated employees pursuant to an agreement between the employer and the union, and that even though plaintiff had been able to cross the picket line no work would have been available to him. The record in this case is very lengthy, making it impracticable to set out the evidence in this opinion. It is sufficient to say that there was evidence introduced on behalf of the plaintiff which contradicts the defendants' evidence, and which, if believed, would justify a verdict for plaintiff." (R. 699, Appendix B, p. 16a.)

In connection with these Assignments of Error the Alabama Supreme Court did not explain what evidence was introduced by the plaintiff which would justify a verdict for him. In connection with a further Assignment of Error, however, the Court did discuss the evidence, this being the only discussion of the evidence contained in its decision, as follows:

> "The record reveals that plaintiff introduced evidence tending to prove the following: Plaintiff was a regular employee of the Calumet and Hecla Consolidated Copper Company (Wolverine Tube Division). He worked regularly at an hourly rate of pay and averaged approximately fifty hours a

week for the six months preceding July 18, 1951. On occasions when no work was available, the employees were notified in advance by the company. Plaintiff had not been notified that there would be no work on July 18, 1951, and he and numerous other employees went to the plant on that morning expecting to work. When these employees arrived at the approaches to the plant, they found that a strike was in progress, directed by officials of the defendant union, including defendant Michael Volk. The union placed a picket line across the street leading into the plant. Plaintiff attempted to drive through the picket line; but large numbers of men closed in around his car, making it impossible to go forward. One of the strikers held onto the door handle, and there were shouted threats to turn plaintiff's car over, along with other threatening shouts from the strikers. After some time, plaintiff left the scene and returned to his home. No hourly rated employees were able to cross the picket line until August 22, 1951, when, with the aid of a large number of law enforcement officers, approximately two hundred employees entered the plant and resumed work.

"Frank W. Oakes who was Industrial and Public Relations Director for the plant and who represented the management at a prestrike meeting with the union, denied telling union officials that the plant would be closed to hourly rated employees during the strike."

The Supreme Court of Alabama made no finding that a sufficient number of employees reported to work on July 18, 1951 to enable the employer to operate the plant, or that the Respondent personally would have been afforded work had he entered the plant on the morning the strike began (R. 700, Appendix B, p. 17a).

Concerning whether or not work would have been available to the Respondent had he entered the plant premises during the strike, the record reveals the following uncontradicted facts:

In meetings on July 17, 1951 over four hundred of the employer's total three-shift complement of slightly over five hundred hourly paid employees (R. 95) voted almost unanimously to go on strike (R. 319, 321, 322, 347, 349, 478, 482). All of these four hundred employees supported the strike and participated in picketing (R. 507).

Howard Babis, Company Foreman, testified that he was advised by Mr. Oakes, or some other supervisory official of the Company, that the plant would be closed during the strike (R. 307, 308). The Company stopped charging the furnaces prior to the time the next shift was scheduled to come to work on the morning of the strike and employees were requested by their supervisors to stay and help finish extruding copper billets already in the furnace (R. 370, 371). About 6 o'clock in the morning of July 18, 1951, employee W. A. Bowling was told by his foreman that the plant was going to close during the strike (R. 385).

The Respondent Russell, after the morning the strike began on July 18, went back to the picket line on only two occasions until the plant reopened on August 22, 1951. These visits were for the purpose of observation and he made no effort to enter the plant (R. 110). He did not contact the Company to see if he should come to work but "assumed that there was no work" (R. 109).

Respondent Russell throughout the period following July 18, when the strike began, was engaged in procuring employees to sign petitions addressed to the *company* to the effect that "if the company will reopen the gates

to the people, we will cross the picket line and return to work" (R. 112), and to the effect that they were willing to return to work on former terms and conditions of employment if the Company would "reopen your plant" (R. 142, 143). Russell testified that he was attempting to get from two hundred to two hundred and fifty employees to sign the back-to-work petition as in his opinion, it would take that many to operate the plant, and he had been advised by his attorney that the Company would not consider reopening the plant until this was done (R. 115).

From the beginning of the strike on July 18, 1951 until the receipt of Russell's back-to-work petition on August 20, the Company made no effort to procure an injunction against mass or excessive picketing, made no effort to bring in materials and did nothing indicating any desire to operate the plant. On August 20 the Company notified all employees by letter that the plant would reopen on August 22 and requested that they return to work (R. 109, 110). On August 20 and 21, 1951 a full page newspaper advertisement was run in the local newspaper advising all employees that the plant would reopen on August 22 and advising them to return to work (R. 105).

The Respondent Russell was employed as an electrician at an hourly rate of pay of $1.75, and was earning slightly over $100 per week at the time of the strike (R. 81). He returned to work on August 22, when the plant reopened, after a period of approximately five weeks from the beginning of the strike, having lost less than $500 in wages (R. 99). Russell was not touched, or injured personally when he attempted to cross the picket line on July 18, and neither was his car damaged in any manner (R. 139).

Russell was "bitterly opposed" to unions (R. 132). When he returned to work he organized an "Industrial Employees' Club" (R. 126). One of the purposes of the Club was "carrying on the employer-employee functions without the intervention of any union" (R. 127). Russell initiated the idea of filing damage suits against the Petitioners and solicited other employees to file similar damage suits (R. 134 *et seq.*) His object was to get as many people as possible to file damage suits (R. 137).

Contentions of the Respondent in the Supreme Court of Alabama that the plaintiff's complaint set forth a cause of action for false imprisonment were discarded by that Court, the Court holding as to the nature of the cause of action alleged:

> "We think the complaint states a cause of action for unlawfully and maliciously preventing plaintiff from engaging in his employment." (R. 696, Appendix B, p. 15a.)[4]

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[4] It is contended that, in holding the evidence sufficient to sustain the verdict, the Supreme Court of Alabama denied a Federal right by making a finding which is shown by the record to be without evidence to support it. The following cases are believed to sustain the presentation of this Federal question: *Fiske v. Kansas*, 274 U. S. 380, 385-6; *Creswill v. Grand Lodge*, 225 U. S. 246, 261; *Sterling v. Constantin*, 287 U. S. 378, 398.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SUPREME COURT OF ALABAMA IS INCONSISTENT WITH DECISIONS OF THIS COURT AND IS PROBABLY INCORRECT.

(1) This Court has repeatedly and consistently held that the jurisdiction of the National Labor Relations Board to regulate and interbalance the rights of employees protected by Section 7 of the National Labor Relations Act, as amended, is exclusive, and is not to be aided by concurrent efforts of states to afford additional protection.

In *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, v. O'Brien*, 339 U. S. 454, 456, this Court said:

> "Congress has not been silent on the subject of strikes in interstate commerce. In the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. (Supp. III) Sec. 141, Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act."

In that case this Court invalidated the application of the Michigan strike vote law to strikes in industries affecing interstate commerce.

In *Hill v. Florida*, 325 U. S. 538, the Court invalidated the Florida law requiring a license for labor representatives because the law limited the freedom of choice of bargaining representatives by employees and impinged

upon the collective bargaining process protected by the National Labor Relations Act.

In *Bethlehem Steel Company v. New York State Labor Board*, 330 U. S. 887, and in *Plankinton Packing Company v. Wisconsin Employment Relations Board*, 338 U. S. 953, the Court protected the jurisdictional integrity of the National Labor Relations Board as to unit certifications and as to remedies for unfair labor practices against inroads by state agencies.

Explanatory of these decisions in *Amalgamated Association of Street, Electric Railway, etc. Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383, 390, this Court said in footnote 12:

> "Section 7 of the Labor Management Relations Act not only guarantees the right of self organization and the right to strike, but also guarantees to individual employees the 'right to refrain from any or all of such activities' at least in the absence of a union shop or similar contractual arrangement applicable to the individual. Since the N. L. R. B. was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. *Plankinton* and *O'Brien* both show that states may not regulate in respect to rights guaranteed by Congress in §7."

In *Garner v. Teamsters Union*, 346 U. S. 485, 490, this Court made it clear that the conflict of jurisdiction between federal and state procedures applied to regulation by state courts as well as to state administrative agencies, saying:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It

went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures were necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.

* * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or an application of the federal Board, precludes state courts from doing so. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261. And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action. Cf. *Bethlehem Steel Co. v. New York Board*, 330 U. S. 767."

In the same case the Court pointed out that the conflict in duplicate regulation or jurisdiction between state and federal authorities is primarily a conflict in remedies, and that where a federal remedy has been provided in the public interest, the state remedy for the protection of primarily private rights must yield, as follows:

"Further, even if we were to assume, with petitioners, that distinctly private rights were enforced by the state authorities, it does not follow that

> the state and federal authorities may supplement each other in cases of this type. The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent." (346 U. S. 485, 498.)
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> * * *
>
> "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded." (346 U. S. 485, 500.)

However, the Court has held that the National Labor Relations Act, while regulating interstate commerce in the public interest, creates and protects substantive rights which are not dependent upon state law, (*National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 123); and that the authority granted to the National Labor Relations Board to protect the rights of individuals is remedial and is not intended for the vindication of public wrongs.

> "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. * * * All these measures relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury * * *."

Republic Steel Corp. v. N. L. R. B., 311 U. S. 7, 10-11;
Cf. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 235.

(2). This Court has always been careful in its decisions upholding state action which actually or potentially overlaps the subject matter covered by the National Labor Relations Act and the jurisdiction of the National Labor Relations Board, to restrict permissible state action to specific instances where the police power of the state was exercised in an emergency to maintain public safety and order and the use of streets and highways, to incidents where the conduct or subject matter *in judicia* was not regulated or protected by the Federal Act, and to incidents where no parallel remedy is provided before the National Labor Relations Board.

The instant case was not an exercise by the state of its "historic powers over such traditionally local matters as public safety and order and the use of streets and highways." (*Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, 749; *Garner v. Teamsters Union*, 346 U. S. 485, 488) such as that which was recently upheld in the case of *United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, v. Wisconsin Employment Relations Board and Kohler Co.*, ... U. S. ...., 76 S. Ct. 794 (June 4, 1956). Nor does the present case involve an instance of injurious conduct neither prohibited, regulated nor protected by the Federal Act which would be entirely ungoverned unless governable by the state, such as that which was present in *International Union, UAW-AFL v. Wisconsin Employment Relations Board*, 336 U. S. 245, 254. Nor is it a case such as that before the Court in *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 663, where

"Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." There the complaining party, or plaintiff, in the court below was an employer whose rights are not attempted to be protected by Congress in Section 7 of the National Labor Relations Act, and whose rights when violated cannot be redressed under Section 8 (b) (1) of the National Labor Relations Act. Here the plaintiff below (Respondent) is an employee whose rights to refrain from striking and to work in the face of a strike are specifically protected by Section 7 of the Act, and to whom a specific remedy is granted by Section 8 (b) (1) of the Act for the violation of these rights.[5]

In the decision of the *Laburnum* case, *supra*, this Court was exceedingly careful to point out that its decision applied only to an employer who had no remedy before the National Labor Relations Board, saying:

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious

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[5] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).". (29 U. S. C. 157.)

"Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (a) employees in the exercise of the rights guaranteed in section 7 * * *." (29 U. S. C. 158 (b) (1)).

> conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." (347 U. S. 656, 665.)

Again, making it abundantly clear that it did not intend that the *Laburnum* decision should apply to any case in which an administrative remedy was provided by the Federal Act, in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, the Court felt compelled twice to distinguish the *Laburnum* case, saying:

> "Finally, *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, was an action for damages based on violent conduct which the state court found to be a common law tort. While assuming that an unfair labor practice under the Taft-Hartley Act was involved, this Court sustained the state judgment on the theory that there was no compensatory relief under the federal Act and no federal administrative relief with which the state remedy conflicted." (348 U. S. 468, 477.)
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> • • •
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> "Our approach was emphasized in *United Construction Workers v. Laburnum Construction Corporation, supra,* where the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act." (348 U. S. 468, 480.)

(3) Under the decisions of this Court the power of the National Labor Relations Board to enter remedial and reparation orders is coextensive with the discretion granted to the Board to take such remedial action as will effectuate the policies of the Act.

The National Labor Relations Board has often held that it is a violation of Section 8 (b) (1) of the Act for a

labor organization or its agents to interfere by mass picketing, violence or threats of violence, with the right of an employee to work during a strike.[6] This construction of Section 8 (b) (1) accords with expressions of legislative intent at the time the provision was being considered by Congress.[7] and with the holding of this Court in footnote 12 to the opinion in *Amalgamated Association of Street, Electric Railway, etc., Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383, 390, *supra*.

The Board, however, has held that it is without power or jurisdiction to enter an award of back pay where the wages lost by the employee were as the result of an interference with his right of ingress to his place of employment, as in the instant case. *Colonial Hardwood*

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[6] E. g. *Sunset Line and Twine Co.*, 79 N. L. R. B. 1487, 1504, where the Board said:

"Under this Section one of the new statutory provisions in which union unfair labor practices are defined and proscribed, the essential elements of a violation are three-fold. There must be (1) restraint or coercion, (2) practiced by a labor organization or its agents, (3) against employees in the exercise of rights guaranteed in Section 7 of the Act.

"In this case the trial examiner accepted the general counsel's premises that the third element is present, namely, the protected right of employees to 'refrain' from striking, that is, to work in the face of the strike.

"We agree that employees enjoy that protected right under the Act, as amended, and that there was interference with its exercise in this case."

[7] Senator Taft said:

"I think when we get to the case of unions there might be the actual act of forceably, by mass picketing, preventing a man from working.

"Let us take the case of mass picketing which absolutely prevents all the office force from going into the office of the plant. That would be a restraint and coercion against those employees, and in-

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Flooring Company, Inc., 84 N. L. R. B. 563, 595; *United Mine Workers of America and West Kentucky Coal Co.*, 92 N. L. R. B. 916. This holding of the National Labor Relations Board, which was a ruling of law construing the Act as distinguished from an exercise of discretion in determining what type of order would effectuate the policies of the Act, was relied upon by the Supreme Court of Alabama in its original decision upon the question of Federal preemption in the instant case.

This construction of the Act by the National Labor Relations Board and by the Supreme Court of Alabama is in apparent conflict with the decisions of this Court in *Phelps-Dodge Corporation v. N. L. R. B.*, 313 U. S. 177 and *Virginia Electric and Power Co. v. N. L. R. B.*, 319 U. S. 533. In the former case the Court said:

> "To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.
>
> "But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs, by not directing the Board 'to take such affirmative action as will effectuate the policies

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terference with their right to work. * * * The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, 'Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn.' The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat or force, or threat of economic reprisal, prevent them from exercising their right to work.' As I see it that is the effect of the amendment." 93 Congressional Record 4562.

> of this Act,' *simpliciter,* but, instead, by empowering the Board 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' To attribue such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority, which but for the illustration, it clearly has given the Board. The word 'including' does not lend itself to such significance." (313 U. S. 177, 188-9.)

And in the latter case the Court said:

> "The declared policy of the Act in Section 1 is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest. See *Labor Board v. Jones and Laughlin,* 301 U. S. 1. Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay. *Phelps-Dodge Corp. v. Labor Board,* 313 U. S. 177, 187-89. The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the court to determine.' *I. A. of M. v. Labor Board, supra,* at page 82; *Labor Board v. Link-Belt Co., supra,* at page 600. Here the Board in the exercise of its informed discretion, has expressly determined that reimbursement in full of the checked-off dues is necessary to effectuate the policies of the Act." (319 U. S. 533, 539.)[8]

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[8] The decision of the Board in *Colonial Hardwood Flooring Co., Inc.,* 84 N. L. R. B. 363, 365, upon which the Board relied for its decision in the *United Mineworkers of America* decision (92 N. L. R. B. 916) is in

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In Section 1 (b) of the Labor Management Relations Act, 947 (61 Stat. 136, 29 U. S. C. 141 (b)), Congress made the ollowing declaration of policy:

> "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, *to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce*, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (Emphasis supplied.)

This expression of policy to protect the rights of individual employees is implemented by the legislative history of Section 10(c), especially in House Report 245, on H. R. 3020 (80th Congress, First Session), page 42. The House Report in commenting upon the House Bill which provided

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direct opposition to these quotations from the decisions of this Court. In the *Colonial Hardwood Flooring* case the Board adopted and followed exactly the reasoning which was repudiated by this Court in the *Phelps Dodge Corp.* decision. The Board attributed to the illustrative phrase in Section 10 (c) of the amended Act: "*Provided*, that back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him," an intent of Congress to limit the power of the Board. Clearly this proviso illustrates the type of order which might be found appropriate in cases specifically involving discrimination and tenure of terms of the employment relationship between the employee and his employer, and is in no manner a limitation upon the general power of the Board "to take such affirmative action as will effectuate the policies of the Act."

only that the Labor Board should take such affirmative action as would effectuate the policies of the Act, said:

> "This Section, dealing with remedies the Board may prescribe contains these three significant changes.
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> "A. One, in language like that which is applicable to employers who violate Section 8 (a) authorizes the Board to order unions and their adherents who violate Section 8 (b) to cease and desist from unfair labor practices and to take such affirmative action as will effectuate the policies of the Act. * * * *Under this clause the Board may also require a union to reimburse an employee whom it causes to lose pay the amount that he loses.*" (Emphasis supplied.)
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> Cf., Senate Report 105 on S. 1126 (80th Congress, First Session), p. 26.

The basic remedial power granted to the Board in Section 10 (c) of the amended Act (29 U. S. C. 106(c)) states:

> "the Board shall state is findings of fact and shall issue and cause to be served on such persons an order requiring such persons to cease and desist from such unfair labor practice *and to take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this Act.*" (Emphasis supplied.)

These powers are identical to those contained in the House amendment which the House explained as giving power to make back pay orders against unions. When this basic power is construed in the light of the previous decisions of this Court, which hold that the words "including reinstatement of employees with or without back pay" are illustrative only, it is clear that the previous power

the Board to enter such remedial and reparation orders would effectuate the policies of the Act was not diminished by the amended Act but was, in fact, extended so as to authorize back pay orders against unions as well as against employers.

(4) In summary we believe that this Court by its previous decisions has clearly pointed out that a state is without jurisdiction to supplement the remedial powers granted to the National Labor Relations Board by court action, and has held that to the extent that Congress has prescribed procedure for dealing with the consequences of tortious conduct already committed, state liabilities for the same tortious conduct have been eliminated. (*United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 665.)

The question of the remedial powers of the Board to interbalance the rights of strikers and non-strikers is in issue. This is an important question involving the very existence of the right to strike, for such right cannot exist where it is to be subjected to a myriad of interpretations which depend solely upon the understanding of state trial courts as to the extent of the right and upon the prejudices of local juries.[9]

[9] Unless the question of the Board's power under Section 10 (c) of the Act to grant remedial relief for violation of Section 8 (b) (1) is decided in this case it may never reach this Court for decision because the Board, having ruled upon the question, will not apply for a review of its own ruling in a Circuit Court of Appeals. Employers, even if they are parties to an unfair labor practice proceeding, will not have such an interest in the question of the liability of a labor organization for unfair labor practices committed upon an employee as to cause them to go to the expense of appellate review. Employes, whose rights are violated, are unable for financial reasons to secure a review of a Labor Board ruling without the aid of the services of the Labor Board itself; and a labor union, in an unfair labor practice proceeding against itself, certainly will not question the propriety of the Board's construction when a reversal of that ruling would render it liable to a back pay award.

From the foregoing it appears that the decision of the Supreme Court of Alabama was contrary to the decisions of this Court as to the remedial powers of the Board and as to the exclusiveness of federal regulation of the rights protected in Section 7 of the Act, and that an important question concerning the construction and application of a federal statute is presented.

II.

THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF FEDERAL COURTS OF APPEAL AND OF THE COURTS OF OTHER STATES.

In the cases of *Born v. Laube*, 213 Fed. 2d 407 (CA-9) (reh'ng den. 214 F. 2d 349, cert. den. 348 U. S. 855); *McNish v. American Brass Co.*, 139 Conn. 44, 89 Atl. 2d 566, (cert. den. 344 U. S. 913); *Mahoney v. Sailor's Union of the Pacific*, 45 W. 2d 453, 275 Pac. 2d 440 (cert. den. 349 U. S. 915); and *Sterling v. Local 438, Liberty Ass'n of Steam and Power Pipefitters and Helpers Ass'n*, 207 Md. 132, 113 Atl. 2d 389 (cert. den. 350 U. S. 875), each of the courts held that courts are without jurisdiction to entertain a suit for damages against a labor organization, brought by an employee, to recover for union interference with employment on account of non-membership in a labor organization. The reason for the decision in each case was that the National Labor Relations Board was given exclusive jurisdiction to redress the rights of the employee.

In *Born v. Laube*, the Court of Appeals said:

> "It is argued that the Board, although having authority to require the offending union to reinstate and financially to make whole the victim of the unfair labor practice, is without power to assess punitive damages; consequently, the view should be

taken that Congress did not intend to preclude the victim from enforcing this private right in an action at common law. However, we think it evident that since the Act provides a procedure for redress and a corresponding remedy, both the procedure and the remedy are exclusive in the absence of an express provision or Board delegation to the contrary. As said in *Nathanson v. N. L. R. B.*, 344 U. S. 25, 27: 'A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice (citation). Congress has made the Board the only party entitled to enforce the Act.' A remark of Justice Holmes in *Charleston & Western Carolina Railway Co. v. Varnville Furniture Company*, 237 U. S. 597, 604, though dealing with an unrelated subject, is pertinent here. 'When Congress,' he said, 'has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." (213 F. 2d 407, 410.)

On rehearing the Circuit Court distinguished the case of *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656 saying:

"We have carefully considered the *Laburnum* decision and are of opinion that it is distinguishable inasmuch as the complaining party there, under the Labor Management Act, was wholly without remedy in damages for the tortious conduct of the Union. Here the complaining employee had available the remedy of reinstatement with back pay."

The Supreme Court of the State of Washington also distinguished the *Laburnum* decision in a similar suit for

damages for discrimination as to employment brought by an employee against a union, saying:

> "*United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 74 S. Ct. 833, relied upon by respondent, does not announce a different rule. In that case the state court was held to have jurisdiction, because the act does not provide a procedure under which the plaintiff in that action could have obtained the compensatory relief which he sought—damages for loss of profits due to interference with the performance of the plaintiff's contracts." *Mahoney v. Sailor's Union of the Pacific*, 45 W. 2d 453, 275 Pac. 2d 440, 445.

In the *Sterling* case (207 Md. 132, 113 Atl. 2d 389, 396, the Maryland court stated:

> "Here the very rights of a worker which Congress afforded protection by the National Labor Relations Board are sought by appellant to be protected by the courts of Maryland. Congress has provided the exact type of remedy which the state could afford, that is, the Board is empowered not only to require the union to cease its unlawful activity and discrimination, but to pay the injured worker the same amount and type of compensatory damages he could recover in the state court. No question of the police power of the state is involved. It is no answer to say, as the appellant does, that the statute of limitations under the Tart-Hartley Act is six months, whereas in the state court it is three years, or that he cannot recover punitive damages before the Board. The appellant himself has waited several years without seeking any relief from the Board. He should have applied to it as soon as his rights were affronted, and he cannot pull himself up by his boot straps by waiting several years and claiming inadequacy of remedy because of lapse of time."

In the case of *McNish v. American Brass Company*, 139 Conn. 44, 98 Atl. 2d 566, the Connecticut court wrote an excellent opinion in which, relying on the decisions of this Court, it pointed out that in those fields in which it was intended that the federal legislation should be operative the regulations enacted into law by Congress are exclusive and that one of the phases of labor relations affecting interstate commerce which the National Labor Relations Acts does purport to cover is the matter of union unfair labor practices.

This Court denied certiorari in all four of these cases,[10] in which the conclusion was opposite to the conclusion reached by the Supreme Court of Alabama in the instant case.

There is no logical distinction between the remedial powers of the Board under Section 10 (c) in redressing violations of Section 8 (b) (1) and in redressing violations of Section 8 (b) (2). In each case the remedial power granted to the Board is "if * * * the Board shall be of the opinion that any person named in the complaint has engaged in, or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 29 U. S. C. 160 (c).

The decision below is also in apparent conflict with the decision of Judge Parker, speaking for the 4th Circuit,

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[10] *McNish v. American Brass Co.*, 344 U. S. 913; *Born v. Laube*, 348 U. S. 855; *Mahoney v. Sailor's Union of the Pacific*, 349 U. S. 915; *Sterling v. Local 438, Liberty Assn., etc.*, 350 U. S. 875.

in the case of *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 167 Fed. 2d 183, 190, when he said:

> "Recompense of lost wages on account of an unfair labor practice is a matter for the Labor Board. See *Phelps-Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 194; *International Union, etc. v. Eagle Picher Co.*, 325 U. S. 340; *Wallace Corp. v. N. L. R. B.*, (4th Cir.) 159 Fed. 2d 952."

III.

AN IMPORTANT QUESTION IS PRESENTED AS TO THE PROTECTION OF THE INTEGRITY OF THE RIGHT TO STRIKE AND THE INTERBALANCING OF THIS RIGHT WITH THE RIGHT OF EMPLOYEES TO WORK IN THE FACE OF A STRIKE; AND AS TO WHETHER CONGRESS THOUGHT THESE MATTERS COULD BEST BE REGULATED BY A SINGLE HARMONIOUS PATTERN OF RULES ADMINISTERED BY AN EXPERT AGENCY AND ENTRUSTED THEM TO THE NATIONAL LABOR RELATIONS BOARD.

This Court has always held that within the realm of the subject matter entrusted to the National Labor Relations Board, the jurisdiction granted to the Board by Congress was intended to be exclusive, and that Congress intended to dispel the confusion which would result from a dispersion of authority and from multiplicity of regulation (*Garner v. Teamsters Union*, 346 U. S. 485; *Amalgamated Association of Street, Electric Railway, etc., Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383).

In *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 264, this Court said:

> "To attain its object Congress created a particular agency, the National Labor Relations Board, and established a special procedure. The aim, character, and scope of that special procedure are determina-

tive of the question now before us. Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.

"Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose."[11]

The right of employees to organize and to strike is fundamental right. *National Labor Relations Board v. nes and Laughlin Steel Corp.*, 301 U. S. 1, 33. Not only the right fundamental, but it is a right guaranteed to nployees by Section 7 of the National Labor Relations ct. *Amalgamated Association of Street, Electric Railay, etc., Employees v. Wisconsin Employment Relations oard*, 340 U. S. 383, 390. The existence of a guaranteed ght to engage in a lawful strike carries with it the necesry correlative guarantee that such right may be exersed free of liability in damages for economic loss proxiately caused thereby to others.[12]

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[11] The deletion from Section 10 (a) of the amended Act of the word "exclusive" was not intended to vest courts with general jurisdiction over fair labor practices, but merely to recognize the special jurisdiction sted in courts by Section 10, Sub-Sections (j) and (l), and Sections 1 and 303 of the Act. *Amazon Cotton Mill Co. v. Textile Workers ion of America*, 167 Fed. 2d 183, (C. A. 4).

[12] This right is expressed in *Restatement of Torts*, Sec. 809, as lows:

"When concerted action by workers against another causes economic loss to a third person through the effect of the action on the other, the workers are not liable for such loss if their action was not directed against the third person and is privileged as to the other against whom it was directed."

There was no question in this case but that the Respondent lost five weeks time from his work during a *lawful* strike, and that he incurred a consequent loss of wages. The principal factual issue was whether or not this loss of wages was the proximate result of the strike or of picketing in furtherance of the strike. The Petitioners contended that the employer was caused to close its plant because so many of its employees voluntarily participated in the strike that it would have been impossible to operate. The Petitioners further contended below that there was no showing that any work would have been available to the Respondent if he had been permitted to pass through the picket line and enter his place of employment, and that consequently he suffered no loss of wages as a result of excessive picketing.

The jury returned a verdict for Respondent in the amount of $10,000 (R. 54, Appendix D, p. 60a), which necessarily means that in excess of $9,500 of the verdict was a regulatory or punitive award.

This is only one of thirty identical cases filed by employees against the union and its agent, Michael Volk.[13]

It is immediately apparent that if there is a federally protected right to strike, such right cannot exist where it is to be subjected to regulation by the opinions and

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[13] Other verdicts have been returned in the amounts of $8,000 (McLemore v. International Union and Michael Volk, #6150 in the Circuit Court of Morgan County, Alabama, new trial granted for improper argument of plaintiff's counsel); $10,000 (James W. Thompson v. International Union and Michael Volk, #6151 in the Circuit Court of Morgan County, appeal pending in Supreme Court of Alabama); and $18,450 (N. A. Palmer v. International Union and Michael Volk, #6152 in the Circuit Court of Morgan County, appeal pending in Supreme Court of Alabama). Of six trials, four have resulted in verdicts as shown and two have been declared mistrials because the jury were unable to agree upon a verdict.

ejudices of jurors in the thousands of state trial courts roughout the nation. Similarly, if there is a right to re-ain from striking—that is, to work in the face of a rike—such right cannot be uniformly protected by the ate trial courts. In one section of the country the pre-ominant public opinion is overwhelmingly in favor of e striking employee and his rights. In such a com-unity an employee, whose right to work during a strike as been interfered with, cannot be protected by jurors ho believe that a "scab" is the equivalent of a traitor to s nation, his fellowman and to himself.

In other communities the available jurors know little, anything, of the trials and pressures which confront ie industrial worker in his struggle for existence, and ave no sympathy or understanding for the lot of in-ustrial employees who withdraw their services from their mployer. In these communities it cannot be expected hat a trial jury, who believe all union adherents to be ommunists, can follow with discernment the niceties of actual causation in the question of whether a strike or a icket line was the proximate cause of a loss of wages o an employee.

Thus, the integrity of the right to strike and the inter-alancing of this right with the right to work in the face f a strike are matters which can only be protected and airly regulated through the dispassionate investigation f an impartial and expert agency established for this recise purpose.

If these rights cannot be expected to receive uniform rotection as a result of multiplicity of tribunals and di-ersity of procedures before the state and federal courts equity (*Garner v. Teamsters Union*, 346 U. S. 485; *mazon Cotton Mill Co. v. Textile Workers Union of*

America, 167 Fed. 2d 183), then it could not be hoped that the rights would receive any semblance of general equality if subjected to thousands of varying interpretations by a myriad of state trial courts and juries.

The very basis of the policy of the National Labor Relations Act is that employees shall be free to engage in concerted activities free from financial responsibility. To hold unions financially liable because of their having rendered aid to employees in the exercise of their *lawful* protected rights is to strike at the very basis of freedom of association and of collective bargaining. The collective bargaining process and the administration of contractual rights of employees is dependent upon the financial integrity of unions. No weapon is more effective to disrupt and block the policy of free collective bargaining expressed by Congress in its labor relations statutes than the power to bankrupt the representatives of employees, especially local unions, under a thousand different authorities and rules varying from those of the National Labor Relations Board which Congress intended should be exclusive.

The problem of filtering from the facts the answer to questions of such complexity, that is whether or not the bounds of protected activity have been exceeded, and if so, have they caused financial loss to employees, can best be left to the skilled and professional discernment of the National Labor Relations Board in its development of substantive rules of permissible and prohibited conduct in labor controversies.

This is not to say that mass picketing, threatening of employees, obstructing streets and highways, and picketing of homes are matters which the state may not prohibit in the exercise of its police power in an emergency. A

state court of equity, under the rules established by this Court in *Milkwagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 296, can prohibit excessive conduct which breaches the public peace and order without reaching into the field of interbalancing the exercise of rights protected by Section 7, which field was placed by Congress into the hands of the Board.

In conclusion, this is one of those cases concerning the question of the extent to which Congress has withdrawn labor activity from state authority, which "penumbral area can be rendered progressively clear only by the course of litigation." *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 480-1. It presents a question of great importance to unions generally, due to the rising flood of damage actions growing out of strike activity which they are being called upon to defend. The further clarification of this "penumbral area" by this Court is essential for the guidance and conduct of unions generally in litigation of this character.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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